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COURT OF CRIMINAL APPEALS
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NO. 06-19-00045-CR

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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF TEXAS

DANIEL THOMAS BARNES **Appellant,**

v.

THE STATE OF TEXAS **Appellee.**

Appeal from Gregg County

STATE'S PETITION FOR DISCRETIONARY REVIEW

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Identity of Judge, Parties, and Counsel

Pursuant to Tex. R. App. P. 68.4(a) (2014), the Judge, parties, and counsel in this suit are:

TRIAL JUDGE:	**The Honorable Scott Novy** **188th Judicial District Court** **Longview, Texas**
APPELLANT:	**Daniel Thomas Barnes**
APPELLEE:	**The State of Texas**
TRIAL PROSECUTOR:	**Michael Northcutt** **State Bar # 24037194** **Assistant Criminal District Attorney** **101 East Methvin Street, Suite 333** **Longview, Texas 75601** **Tanya Reed** **State Bar # 24039204** **Assistant Criminal District Attorney** **101 East Methvin Street, Suite 333** **Longview, Texas 75601**
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APPELLATE STATE'S ATTORNEY:	**Brendan Wyatt Guy** **State Bar #24034895** **Assistant Criminal District Attorney** **101 East Methvin Street, Suite 333** **Longview, Texas 75601** **John J. Roberts** **State Bar #24034895** **Assistant Criminal District Attorney** **101 East Methvin Street, Suite 333** **Longview, Texas 75601**
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No. 06-19-00045-CR

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

DANIEL THOMAS BARNES, ... Appellant

v.

THE STATE OF TEXAS, ... …….Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its Criminal District Attorney for Gregg County, and respectfully urges this Court to grant discretionary review of the above named cause, pursuant to the rules of appellate procedure.

Statement Regarding Oral Argument

Oral argument is waived.

Statement of the Case

Appellee was charged by indictment on November 1, 2018 in Cause Number 48046-A with one count of burglary of a habitation with intent to/commission of theft. [CR-I-4]. On February 26, 2019 the State filed notice of its intention to

enhance Appellant's charge due to a prior felony conviction to a first degree felony. [CR-I-24-25]. That same day Appellant's case was called for trial before the court. [RR-IV-1]. The trial court found Appellant guilty. [RR-IV-172]. In the punishment section of the trial, the trial court admitted, over Appellant's objection, State's Exhibits 22 and 23, certified copies of the judgments of two prior out of state convictions alleged to belong to Appellant. [RR-IV-201-202]. The trial court found the enhancement true [RR-IV-214] and sentenced Appellant to 40 years in prison. [RR-IV-216]. On September 25, 2019, the Sixth Court of Appeals (hereafter Court of Appeals) reversed the trial court ruling in part as to the punishment segment of the trial and remanded the case for a new punishment hearing. *Barnes v. State*, No. 06-19-00045-CR, 2019 Tex. App. LEXIS 8578 (Tex. App.-Texarkana 2019)(pet. filed).

Statement of Procedural History

On September 25, 2019, the Sixth Court of Appeals reversed in part the trial court's ruling denying Appellant's motion for a new trial and remanded the case for a new punishment hearing. *Id.* at 12. No motion for rehearing was filed. The State's petition is due October 25, 2019.

Statement of the Facts

On November 1, 2018 Appellant was charged by indictment with a single count of burglary of a habitation, alleged under two paragraphs, Paragraph A

(burglary of a habitation with intent to commit theft) and Paragraph B (burglary of a habitation with commission of theft.) [CR-I-4]. On February 25, 2019 Appellant waived his right to trial by jury and the case was set for a contested trial before the court. [CR-I-26, RR-III-5-8]. On February 26, 2019, the State filed notice of its intention to enhance Appellant's case to a first degree felony due to him having a prior final felony conviction. [CR-I-24-25].

Appellant's case was called for trial on February 26, 2019. [RR-IV-1]. During the trial, the State called the victim of the offense, Mr. Michael Minshew. [RR-IV-28]. Mr. Minshew described how the offender destroyed things all over his house, spread oil throughout his property, and destroyed items he could not replace. [RR-IV-29-30]. Mr. Minshew then described how the offender stole rifles, jewelry, electronic items, clothing, a golf cart, and even stole the rings that Mr. Minshew's eight year old son had earned playing baseball. [RR-IV-31-32].

The trial court found Appellant guilty under Paragraph A of the indictment. [RR-IV-172]. The case then proceeded to the punishment section of the trial. [RR-IV-174], and the State called Mr. Minshew back to the stand. [RR-IV-175].

Mr. Minshew described how the offense was not only a tremendous inconvenience to him but that it was terrifying to his wife and children. [RR-IV-175]. Mr. Minshew also described how his family permanently lost professional photographs that were destroyed during the offense and that it had directly cost

him more than $10,000 to make good on his losses from the offense. [RR-IV-176]. Mr. Minshew also testified that it was difficult even convincing him wife and children to return to the home after the burglary. [RR-IV-177].

The State then called Detective James Bray of the Longview Police Department to testify. [RR-IV-178]. Detective Bray explained what the Aryan Brotherhood was [RR-IV-180] and then testified that he believed Appellant was a member of that gang. [RR-IV-181]. Detective Bray then specifically noted that Appellant had a swastika, lightning bolts, the words, "Aryan Pride", and the letters "G-F-T-B-D-", believed to stand for "God forgives. The Brotherhood doesn't", tattooed on his body. [RR-IV-182]. Detective Bray also established that the Aryan Brotherhood is a white supremacist group [RR-IV-182] and that they are violent and a danger to the community. [RR-IV-182-183].

The State then called Investigator Hall Reavis of the Gregg County Criminal District Attorney's Office. [RR-IV-187]. Investigator Reavis sponsored into evidence the admission of State's Exhibits 18-24, records of prior judgments of Appellant. [RR-IV-196, 200, 202.]

State's Exhibit 18 included a certified copy of the judgment against Appellant in Cause Number 10ML-CR00132-01 out of the Circuit Court of Miller County, Missouri for three counts of felony forgery. [State's Exhibit 18]. State's Exhibit 18 also showed that Appellant was originally placed on community

supervision for all three counts but on June 8, 2011 had that community supervision revoked and was sentenced to five years imprisonment on each count. [State's Exhibit 18, pages 5-6].

State's Exhibit 19 included a certified copy of the sentence against Appellant in Cause Number 09 CF 1308 out of the Circuit Court of the 18th Judicial Circuit of Du Page County, Illinois for the felony offense of unlawful possession of a controlled substance. [State's Exhibit 19].

State's Exhibit 20 included a certified copy of the judgment against Appellant in Cause Number 2008-C-0210 out of the County Court at Law of Panola County, Texas for a felony state jail theft. [State's Exhibit 20]. State's Exhibit 20 included Appellant's signature on multiple documents. [State's Exhibit 20, pages 1, 3-4, 7, 10-11, 13, 15]. State's Exhibit 20 further showed that Appellant was originally placed on deferred adjudication community supervision in that case [State's Exhibit 18, pages 1-3] and that he was unsuccessful on community supervision and was adjudicated to regular community supervision. [State's Exhibit 18, pages 5-7] after which he was unsuccessful again and was revoked and sentenced to two years confinement in a state jail facility. [State's Exhibit 18, pages 17-18].

State's Exhibit 21 included a certified copy of the judgment against Appellant in Cause Number 44,098-A out of the 188th Judicial District Court of

Gregg County, Texas for a felony state jail offense of burglary of a building. [State's Exhibit 20]. State's Exhibit 21 included Appellant's signature on the judgment. [State's Exhibit 21, page 4.]

State's Exhibit 22 included a certified copy of the judgment against Appellant in Warrant Number GS422077 out of the Criminal Court of Davidson County, Tennessee for the misdemeanor offense of Theft. [State's Exhibit 22]. State's Exhibit 22 included Appellant's signature on the judgment. [State's Exhibit 22, page 1.] State's Exhibit 22 shows that Appellant was placed on community supervision for this offense. [State's Exhibit 22, page. 1].

State's Exhibit 23 included a certified copy of the judgment against Appellant in Warrant Number GS422076 out of the Criminal Court of Davidson County, Tennessee for the misdemeanor offense of Forgery. [State's Exhibit 23]. State's Exhibit 23 included Appellant's signature on the judgment. [State's Exhibit 23, page 1.] State's Exhibit 23 shows that Appellant was placed on community supervision for this offense. [State's Exhibit 22, page. 1].

State's Exhibit 24 included a certified copy of the judgment against Appellant in Cause Number 2009-1620 out of the County Court at Law of Gregg County, Texas for the misdemeanor offense of Criminal Trespass. [State's Exhibit 24]. State's Exhibit 24 included the signature of Appellant. [State's Exhibit 24, page 2].

Appellant objected to the admission of State's Exhibits 18-24 on the grounds that the State had failed to link the judgments to Appellant. [RR-IV-195, 200-201].

Appellant rested without putting on any evidence. [RR-IV-207]. At no point in the trial did Appellant ever deny that the signatures on State's Exhibits 22 and 23 were his. [RR-IV].

The State's closing argument only briefly mentioned State's Exhibits 22 and 23 [RR-IV-210] and noted that Appellant had four prior felony convictions as well as some misdemeanor convictions. [RR-IV-212-213].

Appellant's closing argument emphasized Appellant's need for rehabilitation. [RR-IV-211-212].

The trial court found the enhancement paragraph allegation true. [RR-IV-214]. In pronouncing sentence the trial court noted that other states had given Appellant chances to rehabilitate himself. [RR-IV-215]. The trial court then noted Mr. Minishaw's testimony and stated that Mr. Minishaw testified as to how the crime had affected him in a manner similar to what the court had seen from victims of sexual assault describing how badly they were traumatized. [RR-IV-215]. The trial court then assessed Appellant's punishment at 40 years imprisonment. [RR-IV-216].

Ground for Review

I. While the Court of Appeals properly applied existing precedent governing the admission of prior convictions based on just a defendant's name and signature it is time for that precedent to be overruled by the Court of Criminal Appeals.

II. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in finding that there was harm from the admission of State's Exhibits 22 and 23 as to call for an exercise of the Court of Criminal Appeals' power of supervision

Argument and Authorities

I. While the Court of Appeals properly applied existing precedent governing the admission of prior convictions based on just a defendant's name and signature it is time for that precedent to be overruled by the Court of Criminal Appeals.

The Court of Appeals deemed that the trial court erred in allowing admission of State's Exhibits 22 and 23, prior convictions of Appellant, that only had Appellant's name and signature as a means of linking him to those documents. *Barnes,* No. 06-19-00045-CR at 10-11. Such a conclusion is consistent with this Honorable Court's holding in the *Cain* case. See *Cain v. State,* 468 S.W.2d 856, 859-860 (Tex. Crim. App. 1971). The State contends though that *Cain* itself was incorrectly decided and should be overruled.

Article 38.27 of the Texas Code of Criminal Procedure establishes that evidence of handwriting can be established entirely by comparison made by the factfinder. Furthermore, Article 38.27 also holds that proof by comparison is

insufficient to establish the handwriting of a witness who denies their signature under oath, a determination that necessarily means that proof by comparison can be sufficient evidence to establish the handwriting of a witness who has not denied their signature under oath.

In this case Appellant did not deny under oath that the signatures on State's Exhibits 22 and 23 were his. [RR-IV-207]. Thus it was perfectly appropriate for the trial court, acting pursuant to Article 38.27 to compare Appellant's signatures on State's Exhibits 22 and 23 to other (properly admitted) documents that contained Appellant's signature (State's Exhibits 20, 21, and 24), and to conclude from that comparison that the signatures on State's Exhibits 22 and 23 were Appellant's signature and thus Appellant was the person convicted in State's Exhibits 22 and 23. Article 38.27 allows fact finders to make such comparisons, and to the extent that the *Cain* decision disregards Article 38.27 and intrudes upon the province of the fact finder to decide a question of fact, *Cain* was wrongfully decided and should be overruled.

The *Cain* holding neutered Article 38.27 by effectively ruling that comparison of signatures by the factfinder is insufficient to establish a match between signatures. That decision improperly overturned a legislative judgment that comparison of signature by the factfinder could be sufficient absent an explicit denial from the defense and should be overruled, and once *Cain* is overruled that

would in turn mean that it was proper for the trial court to make a determination as the fact finder that the signatures on State's Exhibits 22 and 23 were those of Appellant, and that in turn would mean the trial court did not err if it considered State's Exhibits 22 and 23 in assessing punishment in this case.

Accordingly, this petition should be granted to decide if *Cain* will continue to serve as controlling precedent in this state, and if *Cain* is held to no longer be good law then the decision of the Court of Appeals which was based on the rationale established by *Cain* should be reversed.

II. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in finding that there was harm from the admission of State's Exhibits 22 and 23 as to call for an exercise of the Court of Criminal Appeals' power of supervision

In the alternative, even if *Cain* is upheld and the admission of State's Exhibits 22 and 23 was accordingly improper, the Court of Appeals still erred in concluding that the admission of those two exhibits could have had a substantial impact on the verdict in this case.

The erroneous admission of extraneous offense evidence is non-constitutional error which must be reviewed for harm under Texas Rule of Appellate Procedure 44.2(b). See *Sandoval v. State,* 409 S.W.3d 259, 304 (Tex. App.-Austin 2013, no pet.); *Johnson v. State,* 84 S.W.3d 726, 729 (Tex. App.-Houston [1st Dist.] 2002, pet. ref'd.); *Avila v. State,* 18 S.W.3d 736, 741-742 (Tex. App.-San Antonio 2000,

no pet.) And under Rule 44.2(b), any error which did not affect the substantial rights of a defendant must be disregarded. A substantial right is affected only when the error had a substantial and injurious effect or influence in determining the verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Thus a trial court's verdict should not be overturned for such error if, after examining the record as a whole, there is fair assurance that the error did not influence the verdict or had only slight effect. See *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

In this case it is simply not plausible, after examining the record as a whole, to believe that any improper admission of State's Exhibits 22 and 23 could have had any sort of substantial or injurious effect on the trial court's verdict. Both of those judgments were misdemeanor convictions and simply would not have had any impact on the trial court's sentence given the egregious nature of Appellant offense, Appellant's extensive criminal history (which included five previous felony offenses), and Appellant's membership in a violent, white supremacist gang, the Aryan Brotherhood.

The evidence presented established that the charged offense was a particularly egregious burglary. Appellant not only broke into Mr. Minshew's home and stole a great many items (including firearms) [RR-IV-31] but also inflicted substantial and entirely gratuitous damage on Mr. Minshew's residence,

effectively destroying the residence. [RR-IV-29-30]. The damage inflicted was so severe that Mr. Minishew estimated that even after taking insurance into account he was still out more than $10,000 to repair his home. [RR-IV-176].

Nor was the harm Appellant inflicted simply monetary as the burglary also greatly traumatized Mr. Minshew and his family. Mr. Minshew testified as to how badly the burglary affected his wife and children with them being afraid to come home even after the residence was repaired. [RR-IV-175, 177]. And the trial judge himself specifically noted that Mr. Minshew's demeanor on the stand was comparable to what the judge had previously seen from victims of sexual assault. [RR-IV-215]. Thus this was obviously a very serious crime that imposed severe financial and psychological harm on the victims and warranted an extremely heavy punishment.

Appellant was also shown to have substantial criminal history even without taking into account the two misdemeanor convictions reflected in State's Exhibits 22 and 23. The other evidence presented at trial established that Appellant had been previously convicted of three felonies in Missouri [State's Exhibit 18], a felony in Illinois [State's Exhibit 19], and two additional felonies [State's Exhibits 20-21] and a misdemeanor [State's Exhibit 24] in Texas. When a defendant has numerous prior felony convictions, the improper admission of prior misdemeanor offenses is very unlikely to improperly affect the verdict. See *Green v. State,* No.

01-01-01129-CR, 2003 Tex. App. LEXIS 1577 at 6-7 (Tex. App.-Houston [1st Dist.] 2003, pet. ref'd.)(mem. op. not designated for publication)(finding no harm in the improper admission of three misdemeanor convictions when the defendant was shown to have numerous felony convictions.) Thus it is not believable that evidence of two out of state misdemeanor offenses would have swayed the trial court when it already had evidence of five prior felony offenses (including most notably a previous burglary offense.) [State's Exhibit 21].

Appellant's prior criminal history also established that Appellant was unlikely to respond well to any rehabilitative effort as those judgments also established that Appellant had failed on community supervision both in Missouri [State's Exhibit 18] and in Texas [State's Exhibit 20]. Given that Appellant's own closing argument emphasized Appellant's need for rehabilitation [RR-IV-211-212], evidence that Appellant had already twice before failed on felony probation would obviously be immensely probative.

And Appellant was also shown to belong to the Aryan Brotherhood [RR-IV-181-182], a violent, white supremacist gang that was established to be a threat to the community at large. [RR-IV-182-183]. Evidence of gang affiliation is relevant at punishment to show the character of the accused. See *Jones v. State*, 944 S.W.2d 642, 653 (Tex. Crim. App. 1996). Thus this evidence too would be extremely powerful evidence, justifying a long trial sentence.

Thus there was overwhelming evidence supporting a 40 year sentence in this case, and the trial court's passing reference to other states having given Appellant a chance at rehabilitation is hardly sufficient justification to find harm in the face of all that evidence.

To begin with it is not even believable that the trial court was considering State's Exhibits 22 and 23 when the trial court made that comment. Separate from those two prior misdemeanor convictions, the evidence at trial established that Appellant was placed on community supervision for both his Missouri felony offenses [State's Exhibit 18, page 3] and his Illinois felony offense [State's Exhibit 19, page 4]. Furthermore, the Illinois offense was actually a drug offense [State's Exhibit 18]. Felony probations have more rehabilitative options than misdemeanor probations, and a felony drug probation (such as reflected in State's Exhibit 18) is obviously going to have greater focus on drug treatment than two misdemeanor property crime probations (like those reflected in State's Exhibits 22 and 23). Thus it is far more likely the trial court was considering State's Exhibits 18 and 19 rather than State's Exhibits 22 and 23 when the trial court referenced Appellant's out of state history.

But beyond that the Court of Appeals' holding entirely fails to acknowledge the trial court's description of Mr. Minshew's testimony. *Barnes,* No. 06-19-00045-CR at 12. This seems a rather remarkable oversight since the trial

court's description (analogizing Mr. Minshew's testimony to that of a victim of a sexual assault) [RR-IV-215] plainly shows that the trial court was greatly affected by Mr. Minshew's testimony and considered that above all else in accessing the sentence in this case.

A trial court's verdict is not to disturbed over the improper admission of evidence when there was otherwise overwhelming evidence to support the verdict. See *Prior v. State*, 647 S.W.2d 956, 959-960 (Tex. Crim. App. 1983). In this case there was overwhelming evidence beyond State's Exhibits 22 and 23 that fully supported the trial court's verdict, and thus it is not believable that the improper admission of State's Exhibit 22 and 23 had any substantial and injurious effect or influence in determining the verdict. For the Court of Appeals to conclude otherwise is thus a radical from accepted and usual court proceedings that warrants being reversed by the Court of Criminal Appeals.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the State prays that this Honorable Court grant this Petition for Discretionary Review and reverse the decision of the Court of Appeals.

Respectfully submitted,

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CRIMINAL DISTRICT ATTORNEY

/s/ Brendan W. Guy

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ATTORNEY FOR THE APPELLEE,
THE STATE OF TEXAS

CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in Appellant's Petition for Discretionary Review submitted on October 7, 2019, excluding those matters listed in Rule 9.4(i)(3) is 2,953.

/s/ Brendan W. Guy
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ATTORNEY FOR APPELLEE,
THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellee's Petition for Discretionary Review has been served on Jeff T. Jackson, Attorney for Appellant by electronic mail at jefftjacksonlaw@gmail.com and on Stacey Soule, State Prosecuting Attorney, at P.O. Box 13046, Austin, Texas 78711-3046 by depositing same in the United States Mail, postage prepaid on the day of October 7, 2019.

/s/ Brendan W. Guy

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ATTORNEY FOR APPELLEE,
THE STATE OF TEXAS

APPENDIX

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In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-19-00045-CR

DANIEL THOMAS BARNES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 188th District Court
Gregg County, Texas
Trial Court No. 48,046-A

Before Morriss, C.J., Burgess and Stevens, JJ.
Opinion by Justice Burgess

OPINION

Daniel Thomas Barnes was convicted of burglary of a habitation in a bench trial. After the State introduced evidence of prior convictions, the trial court found the State's enhancement allegation true, sentenced Barnes to forty years' imprisonment, and ordered him to pay $2,100.00 for his court-appointed counsel. On appeal, Barnes argues that the evidence is legally insufficient to support the trial court's findings that he was guilty of the offense and was the same person who committed several prior offenses alleged by the State.

We conclude that legally sufficient evidence supported the trial court's finding that Barnes was guilty as a party to the offense of burglary of a habitation. We further conclude that legally sufficient evidence linked Barnes to a majority of the prior convictions introduced at punishment. However, we find that Barnes was not linked to two prior Tennessee judgments of conviction by sufficient evidence. Because we cannot say that we have fair assurance that the Tennessee convictions did not contribute to his punishment, we reverse Barnes' sentence and remand for a new trial on punishment only.[1]

I. Background

The evidence at trial established that the owner of the burgled home was Michael Minshew. Minshew's neighbor, Marlon Hardeman, witnessed a portion of the crime. Hardeman testified that he almost ran over a Caucasian lady with "streaks of light blue in her hair" as he was leaving for work. When he returned to the neighborhood with coworkers, he saw the same lady and a small

[1]We also note that the trial court assessed $2,100.00 in attorney fees for Barnes' court-appointed attorney even though Barnes is indigent.

Caucasian male, with lightning bolt tattoos on his throat, standing beside Minshew's Dallas Cowboy golf cart. The golf cart had "a blanket with . . . a lot of stuff in it just bundled up." Hardeman said that a red, four-door car was on the side of the road close to the golf cart. Because he knew the golf cart was Minshew's, Hardeman became suspicious, recorded the license plate number of the red car, and called Minshew before returning to work.

According to Minshew, Hardeman reported on the phone call that the couple was "loading things off [his] golf cart into a red car." Minshew called the police and rushed home to find that his windows had been beaten in, there was "a hole in [his] back door," items throughout the home were destroyed, and blue "2-cycle oil" had been poured all over the home. Minshew noticed that his family's social security cards, birth certificates, and passports were stolen, along with the golf cart, clothes, jewelry, rifles, binoculars, video games, computers, iPhones, iPads, and other electronics.

Cedric Davis, a patrol officer with the Longview Police Department (LPD), responded to Minshew's call, interviewed Hardeman, and caused dispatchers to issue a warning to police to be on the lookout for the suspect vehicle Hardeman described. LPD Officer Keven Nichols testified that officers quickly located a red 2005 Chevrolet Cavalier with a matching license plate in a nearby park. The Cavalier was packed full of items stolen from Minshew's home.

Brent Creacy, another LPD officer, testified that the suspects, Barnes and Cassidy Taylor, were arrested close by. The trial court saw that Barnes had lightning bolts tattooed on his neck. According to Creacy, Barnes admitted that the red Cavalier belonged to him. Taylor led Creacy to the stolen golf cart. Barnes' fingerprints were found on the red Chevrolet packed with

Minshew's stolen items, and Barnes referred to the car as his in both his interview with law enforcement and a recorded conversation with his mother. LPD Investigator Gabriel Downs testified that Barnes "wanted to make a deal" to protect Taylor, his girlfriend. After hearing this evidence, the trial court found Barnes guilty of burglary of a habitation as a party to the offense.

II. Legally Sufficient Evidence Supports Barnes' Conviction as a Party to the Offense

Barnes argues that insufficient evidence supported a finding that he entered Minshew's home. We disagree because we find that legally sufficient evidence supports the trial court's finding that Barnes was guilty as a party to the offense.

A. Standard of Review

In evaluating legal sufficiency of the evidence, we review all of the evidence in the light most favorable to the trial court's judgment to determine whether any rational fact-finder could have found the essential elements of the charged offense. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). We examine legal sufficiency under the direction of *Brooks*, while giving deference to the responsibility of the fact-finder "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). When faced with conflicting evidence, we presume that the trial court resolved any such conflict in a way that supports the judgment, and we defer to that resolution. *State v. Turro*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The "hypothetically correct" jury charge is "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.* Here, the State alleged that Barnes entered a habitation without the effective consent of the owner, Minshew, with the intent to commit theft.[2]

B. Party Liability

Barnes argues that nothing showed he entered Minshew's home. However, the court found that Barnes was guilty as a party to the offense.[3] "A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." TEX. PENAL CODE ANN. § 7.01(a). "A person is criminally responsible for an offense committed by the conduct of another if[,] . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." TEX. PENAL CODE ANN. § 7.02(a)(2).

"While an agreement of the parties to act together in a common design seldom can be proved by direct evidence, reliance may be had on the actions of the parties, showing by either

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[2]A person commits the offense of burglary if, without the effective consent of the owner, the person "enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault." TEX. PENAL CODE ANN. § 30.02.

[3]"It is well settled that the law of the parties need not be pled in the indictment." *Williams v. State*, 410 S.W.3d 411, 414 (Tex. App.—Texarkana 2013, no pet.) (citing *Vodochodsky v. State*, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005); *Marable v. State*, 85 S.W.3d 287, 287 (Tex. Crim. App. 2002)).

direct or circumstantial evidence, an understanding and common design to do a certain act." *Barnes v. State*, 62 S.W.3d 288, 297 (Tex. App.—Austin 2001, pet. ref'd). Thus, circumstantial evidence may be sufficient to show that a person is a party to the offense. *Beardsley v. State*, 738 S.W.2d 681, 684 (Tex. Crim. App. 1987). When "determining whether an individual is a party to an offense and bears criminal responsibility, the court may look to events before, during, and after the commission of the offense." *Id.*

C. Analysis

Barnes argues that the State was required to put forth some proof that he entered Minshew's home with Taylor. He is incorrect. *See Rollerson v. State*, 227 S.W.3d 718, 725–26 (Tex. Crim. App. 2007). "[A] defendant's unexplained [exclusive] possession of property recently stolen in a burglary permits an inference that the defendant is the one who committed the burglary." *Id.* at 725 (citing *Poncio v. State*, 185 S.W.3d 904 (Tex. Crim. App. 2006)). Where the possession of the stolen property is not exclusive, the permitted inference by the fact-finder is that the person in possession of the property was a party to the offense, even where there is no evidence that the person entered the burglarized premises. *See Rollerson*, 227 S.W.3d at 726.

"Evidence is sufficient to convict under the law of parties if the defendant is physically present at the commission of the offense and encourages its commission by words or other agreement." *Rosillo v. State*, 953 S.W.2d 808, 814 (Tex. App.—Corpus Christ 1997, pet. ref'd) (citing *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994) (op. on reh'g)). In addition to the fact that Barnes was found in possession of the stolen property a short time after Minshew

reported the burglary, Hardeman saw Barnes at the scene of the crime with his girlfriend loading Minshew's property, which bore his fingerprints, into his car.

Viewing the evidence in a light most favorable to the verdict, we conclude that legally sufficient evidence supported the trial court's finding that Barnes was a party to the offense.

III. Barnes Was Not Linked to the Tennessee Convictions

Next, Barnes argues that the evidence was legally insufficient to link him to alleged prior offenses and, therefore, that the trial court erred in admitting them into evidence at punishment.

A. Standard of Review

"To establish that a defendant has been convicted of a prior offense, the State must prove beyond a reasonable doubt that (1) a prior conviction exists[4] . . . and (2) the defendant is linked to that conviction." *Henry v. State*, 466 S.W.3d 294, 301 (Tex. App.—Texarkana 2015), *aff'd*, 509 S.W.3d 915 (Tex. Crim. App. 2016) (quoting *Reese v. State*, 273 S.W.3d 344, 347 (Tex. App.—Texarkana 2008, no pet.) (quoting *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007))). "No specific document or mode of proof is required to prove these two elements." *Id.* (quoting *Flowers*, 220 S.W.3d at 921). "In proving prior convictions, identity often includes the use of a combination of identifiers, and '[e]ach case is to be judged on its own individual merits.'" *Id.* (quoting *Littles v. State*, 726 S.W.2d 26, 30–32 (Tex. Crim. App. 1984) (op. on reh'g)). "The totality of the circumstances determines whether the State met its burden of proof." *Id.* (citing *Flowers*, 220 S.W.3d at 923).

[4]As the Texas Court of Criminal Appeals has recognized, "evidence of a certified copy of a final judgment and sentence may be a preferred and convenient means" to prove a prior conviction for enhancement purposes. *Henry*, 509 S.W.3d at 918 (quoting *Flowers*, 220 S.W.3d at 921).

"[T]he proof that is adduced to establish that the defendant on trial is one and the same person that is named in an alleged prior criminal conviction or convictions closely resembles a jigsaw puzzle." *Flowers v. State*, 220 S.W.3d 919, 923 (Tex. Crim. App. 2007) (quoting *Human v. State*, 749 S.W.2d 832, 836 (Tex. Crim. App. 1988)). "The pieces standing alone usually have little meaning." *Id.* (quoting *Human*, 749 S.W.2d at 836). "However, when the pieces are fitted together, they usually form the picture of the person who committed that alleged prior conviction or convictions." *Id.* (quoting *Human*, 749 S.W.2d at 836). The trier of fact is required to fit the pieces of the jigsaw puzzle together and weigh the credibility of each piece. *Id.* "Regardless of the type of evidentiary puzzle pieces the State offers to establish the existence of a prior conviction and its link to a specific defendant, the trier of fact determines if these pieces fit together sufficiently to complete the puzzle." *Id.* If the existence of the conviction and its link to the defendant can be found beyond a reasonable doubt, "then the various pieces used to complete the puzzle are necessarily legally sufficient to prove a prior conviction." *Id.* "The standard of review for evaluating the sufficiency of evidence requires that the appellate court 'consider all the evidence in the light most favorable to the trial court's finding.'" *Henry*, 509 S.W.3d at 919 (quoting *Wood v. State*, 486 S.W.3d 583, 589 (Tex. Crim. App. 2016)).

B. Analysis

The evidence at trial established Barnes' birthdate, social security number, and Texas state identification (ID) number. Barnes complains of the State's use of Exhibits 18–24. The record established that: (1) Exhibit 18, a certified copy of a judgment from Missouri against "Daniel T

Barnes," was linked to Barnes by name and birthdate;[5] (2) Exhibit 19, a certified copy of an Illinois judgment against "Daniel T Barnes," was linked to Barnes by a felony complaint bearing the same cause number, which depicted Barnes' birthdate and social security number; (3) Exhibit 20, certified copies of a Panola County order of deferred adjudication, judgment revoking community supervision, and judgment of conviction entered against "Daniel Thomas Barnes," were linked to Barnes by name and Texas state ID number; (4) Exhibit 21, a certified copy of a judgment of conviction from Gregg County entered against "Daniel Thomas Barnes," was linked to Barnes by name and Texas state ID number; and (5) Exhibit 24, a certified copy of a Gregg County judgment against "Daniel Thomas Barnes," was linked to Barnes by name and date of birth.[6] We find that based on this evidence, a reasonable fact-finder could conclude that Barnes was the person convicted of the prior offenses in Exhibits 18–21 and 24.

However, Exhibits 22 and 23, which were Tennessee "General Sessions Disposition[s]," were not sufficiently linked to Barnes. The Tennessee judgments showed that "Daniel Thomas Barnes" was placed on supervised probation for theft and forgery offenses. They were linked to Barnes only by name and signature. There was no testimony from the sponsoring witness regarding a signature analysis or any other factors that could link Barnes either to the State of Tennessee or the Tennessee judgments.

Unless the defendant's name is unique, a name and signature are insufficient by themselves to link a defendant to a prior conviction. *Strehl v. State*, 486 S.W.3d 110, 114 (Tex. App.—

[5]The social security number on the paperwork comprising Exhibit 18 was one number off from Barnes' social security number.

[6]Although some of the exhibits contained thumbprints, no fingerprint analysis was conducted.

Texarkana 2016, no pet.) ("Evidence that the defendant merely has the same name as the person previously convicted is not sufficient to satisfy the prosecution's burden.") (citing *Beck v. State*, 719 S.W.2d 205, 210 (Tex. Crim. App. 1986)); *see Cain v. State*, 468 S.W.2d 856, 859 (Tex. Crim. App. 1971), *overruled on other grounds by Littles v. State*, 726 S.W.2d 26 (Tex. Crim. App. 1984) ("We conclude that under the circumstances of this case, where handwriting samples are introduced without expert testimony and the [fact-finder] alone must make the comparison, and there is no other evidence to connect the appellant with the prior convictions, such identity has not been sufficiently established."); *Prihoda v. State*, 352 S.W.3d 796, 810 (Tex. App.—San Antonio 2011, pet. ref'd); *see also Henry v. State*, 509 S.W.3d 915, 919 (Tex. Crim. App. 2016) ("even if the name on the judgment matched that of the defendant, a certified judgment on its own is insufficient" to link the defendant to the prior offense); *Smith v. State*, 489 S.W.2d 920, 922 (Tex. Crim. App. 1973); *Rosales v. State*, 867 S.W.2d 70, 74 (Tex. App.—El Paso 1993, no pet.) (trial court erred in admitting prior judgment based on signature comparison).[7]

In *Benton v. State*, we found that a jury was free to compare signatures on prior convictions with the defendant's known signature in order to determine whether the State sufficiently linked the defendant to the prior judgments where other evidence, like a unique name, date of birth, and listing of the defendant's mother's name on the judgments, also linked the defendant to the prior offenses. *Benton v. State*, 336 S.W.3d 355, 357, 358 (Tex. App.—Texarkana 2011, pet. ref'd). This is not such a case. Because Barnes' only link to the prior Tennessee judgments are his

[7]The State asked the trial court to take judicial notice of its file and compare Barnes' signature on the Tennessee judgments to the file because the State was "pretty sure that Mr. Barnes' signature [showed] up somewhere in there." However, the trial court did not indicate that it took notice of its file, and "the record does not reflect that the trial judge made an actual comparison of the signatures." *Prihoda*, 352 S.W.3d at 809.

relatively common name and a signature, we find that the State did not meet its burden to prove that Barnes was the person who had committed the prior Tennessee offenses. Therefore, we sustain Barnes' complaint.

C. Barnes Was Harmed by the Admission of the Tennessee Offenses

"The erroneous admission of extraneous-offense evidence is not constitutional error." *James v. State*, 555 S.W.3d 254, 261 (Tex. App.—Texarkana 2018, pet. dism'd, untimely filed) (quoting *Graves v. State*, 452 S.W.3d 907, 914 (Tex. App.—Texarkana 2014, pet ref'd)). "Rule 44.2(b) of the Texas Rules of Appellate Procedure provides that an appellate court must disregard a nonconstitutional error that does not affect a criminal defendant's 'substantial rights.'" *Id.* (quoting TEX. R. APP. P. 44.2(b)). "An error affects a substantial right of the defendant when the error has a substantial and injurious effect or influence on the jury's verdict." *Id.* (quoting *Graves*, 452 S.W.3d at 914). "We will not reverse based on nonconstitutional error if, after we look at the whole record, we conclude that there is 'fair assurance that the error did not influence the [fact-finder], or had but a slight effect.'" *Id.* (quoting *Graves*, 452 S.W.3d at 914).

"A harm analysis may include overwhelming evidence of guilt." *Id.* Here, we begin our analysis with the assumption that Barnes' evidence of guilt was overwhelming. His second-degree offense for burglary of a habitation was punishable in the first-degree felony range as a result of the trial court's finding of true to the State's enhancement allegation. Thus, Barnes could have been sentenced "for life or for any term of not more than 99 years or less than 5 years." TEX. PENAL CODE ANN. § 12.32(a). Barnes was sentenced to forty years' imprisonment. At first blush,

it appears that Barnes' Tennessee convictions could have had but a slight effect on his sentence. Yet, the record indicates otherwise.

None of Barnes' prior offenses of forgery, theft, possession of drugs, and criminal trespass were violent in nature. In assessing punishment, the trial court said,

> [T]his case basically comes down to the offense itself, Mr. Barnes, and your prior -- prior record. I do agree with [your counsel] that rehab would be beneficial for you, that you were probably on drugs when this offense was committed. The problem is I see that you've had other chances before, and other states have given you chances and you still maintain you're on -- probably still on drugs.

These comments indicate that the trial court did, in fact, consider the Tennessee judgments and that they may have affected Barnes' punishment. Because we are not assured that the Tennessee judgments did not influence the trial court, or had but a slight effect, we reverse the trial court's judgment on punishment and remand the cause for a new punishment hearing.

IV. Conclusion

We sustain Barnes' complaint that the State failed to sufficiently link him to the Tennessee judgments admitted during punishment. While we affirm the judgment of conviction, we reverse the trial court's judgment as to punishment and remand the cause for a new punishment hearing. *See* TEX. CODE CRIM. PROC. ANN. art. 44.29(b).

Ralph K. Burgess
Justice

Date Submitted: September 10, 2019
Date Decided: September 25, 2019

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